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No. 94-466

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In The

Supreme Court of the United States

October Term, 1994

DIAMOND SHAMROCK REFINING AND MARKETING COMPANY,

Petitioner,

v.

NUECES COUNTY APPRAISAL DISTRICT AND THE APPRAISAL REVIEW BOARD OF THE NUECES COUNTY APPRAISAL DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

MOTION OF THE INSTITUTE OF PROPERTY TAXATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF DIAMOND SHAMROCK REFINING AND MARKETING COMPANY'S PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Institute of Property Taxation, by and through its counsel of record, Edward Kliewer, III, of Foster, Lewis, Langley, Gardner & Banack, Incorporated moves the Court for permission to file a brief amicus curiae in the

above entitled case. This motion is made upon the following statements.

STATEMENT AS TO CONSENT

Petitioner Diamond Shamrock Refining and Marketing Company has consented in writing to the filing of the subject amicus brief.

Respondents Nueces County Appraisal District and the Appraisal Review Board of the Nueces County Appraisal District have declined in writing to consent to the filing of the subject amicus brief.

STATEMENT OF INTEREST OF THE INSTITUTE OF PROPERTY TAXATION

The Institute of Property Taxation ("IPT") is a not-for-profit corporation organized under the laws of the District of Columbia with offices at 3350 Peachtree Road, NE, Suite 280, Atlanta, Georgia 30326. IPT is a nationwide organization which has approximately twenty-eight hundred members. The membership includes tax representatives of many business corporations, large and small, throughout the United States; employees of independent tax consulting firms; individual tax consultants; representatives of other professional organizations; and individuals all of whom share a common interest in (1) fostering and promoting the uniform and equitable administration of property taxes and other state and local taxes (except income taxes), and (2) minimizing the costs of administration and compliance with state and local laws.

IPT pursues these purposes through the promotion of education and professionalism of its members, the exchange of information and assistance among its members, cooperation with governmental bodies and the International Association of Assessing Officers to improve state and local tax administration throughout North America, and the establishment and promotion of high standards of competence and efficiency in tax management.

To enhance the education and professionalism of its members, IPT presents annual week-long schools in real and personal property, and sales and use taxation, as well as frequent forums, symposia and conferences concerning more specific topics and interests. It administers two professional certification programs – the CMI ("Certified Member of the Institute") for property tax professionals and the CSM ("Certified Sales Tax Member") for sales tax professionals. IPT members who seek to obtain these professional designations are required to meet rigorous educational and experience requirements and successfully pass comprehensive written and oral examinations.[1]

IPT has a strong interest in the fair administration of state and local taxes and all legal developments that affect such administration. The issue in this case is one of great national significance. The principles decided in this case can affect not only ad valorem personal property

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[1] Appended hereto is a statement of the Institute's principles, purposes and its code of ethics.

taxation, but could be extended to other forms of taxation. This case and its implications and ramifications for other states and for other forms of taxation have been the topic of much discussion at recent IPT gatherings both in formal program presentations and informally among members. IPT members have expressed concern over the potential effect of this case on taxation policy in other States and as to other forms of taxation. They fear a forthcoming wave of new, onerous and unconstitutional taxes on goods in transit. IPT, therefore, has a strong interest in ensuring that, irrespective of the ultimate judgment rendered, the Court's decision is made with full appreciation of the scope and importance of this issue.

Because of the diverse positions and interests of IPT members, consensus is seldom reached among its board of directors when requests for amicus participation are received, and IPT rarely files amicus curiae briefs. In this case, however, upon careful consideration, the board unanimously authorized the filing of this brief. Moreover, in a case involving virtually the same questions concerning exported goods, the board likewise authorized the filing of a brief on behalf of IPT in the state court. By participating as amicus curiae, IPT hopes to provide meaningful assistance in the consideration of this case.

STATEMENT OF PURPOSE AND SCOPE OF AMICUS BRIEF

It is the opinion of the Institute of Property Taxation that the issue before the Court is one of substantial national importance. The Institute believes that it is well

situated to comment upon the national significance of the issue. It is therefore the desire of the Institute to undertake to briefly illustrate the importance of this case and to bring to the Court's attention certain additional authorities and argument relevant to the resolution of the case.

Therefore, the Institute of Property Taxation respectfully requests permission of the Court to submit the enclosed brief in the above-entitled case.

Respectfully submitted,

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The Institute of Property Taxation respectfully joins as Amicus Curiae in Support of Petitioner, Diamond Shamrock Refining and Marketing Company's petition for writ of certiorari to review the judgment of the Supreme Court of the State of Texas in this case.

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The Institute of Property Taxation ("IPT") is a not-for-profit corporation organized under the laws of the District of Columbia with offices at 3350 Peachtree Road, NE, Suite 280, Atlanta, Georgia 30326. IPT is a nationwide organization which has approximately twenty-eight hundred members. The membership includes tax representatives of many business corporations, large and small, throughout the United States; employees of independent tax consulting firms; individual tax consultants; representatives of other professional organizations; and individuals all of whom share a common interest in (1) fostering and promoting the uniform and equitable administration of property taxes and other state and local taxes (except income taxes), and (2) minimizing the costs of administration and compliance with state and local laws.

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professional certification programs – the CMI ("Certified Member of the Institute") for property tax professionals and the CSM ("Certified Sales Tax Member") for sales tax professionals. IPT members who seek to obtain these professional designations are required to meet rigorous educational and experience requirements and successfully pass comprehensive written and oral examinations.[1]

IPT has a strong interest in the fair administration of state and local taxes and all legal developments that affect such administration. The issue in this case is one of great national significance. The principles decided in this case can affect not only ad valorem personal property taxation, but could be extended to other forms of taxation. This case and its implications and ramifications for other states and for other forms of taxation have been the topic of much discussion at recent IPT gatherings both in formal program presentations and informally among members. IPT members have expressed concern over the potential effect of this case on taxation policy in other States and as to other forms of taxation. They fear a forthcoming wave of new, onerous and unconstitutional taxes on goods in transit. IPT, therefore, has a strong interest in ensuring that, irrespective of the ultimate judgment rendered, the Court's decision is made with full appreciation of the scope and importance of this issue.

Because of the diverse positions and interests of IPT members, consensus is seldom reached among its board

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STATEMENT AS TO SCOPE OF BRIEF AMICUS CURIAE

The issue before the Court has been ably addressed by Diamond Shamrock Refining and Marketing Company in its petition for writ of certiorari. IPT, therefore, seeks to briefly address the importance of this case and to bring to the Court's attention some additional authorities relevant to the case, focusing primarily on the Import-Export Clause concerns.

REASONS FOR GRANTING THE WRIT

Years ago this Court recognized the insistent "pressures for new governmental revenues" which present "the baffling task of tapping fresh sources of" funding. *E.g., Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 442 (1940). Those pressures are certainly no less great today. The Texas Supreme Court's exegesis in this case not only impermissibly allows taxation of Diamonds Shamrock's oil in transit but can also be expected to have the same

effect on oil of other concerns. As Diamond Shamrock pointed out, this case directly impacts taxation of the more than fifty billion dollars worth of oil imported annually, which constitutes 10% of all goods imported into the United States each year. (Pet. 7). But, it has no less impact on the other 90% of annually imported goods. While the means of transportation may differ for other goods, those goods are likewise subject to taxation at their ports of entry under the Texas Supreme Court's opinion. Exports, too, are similarly subject to taxation. Moreover, the court's holding may encourage, and be used to support, the impermissible taxation of goods in transit from state to state. Neither are these effects restricted to the taxing authorities concerned in this case. In this quest for sources of funding, other Texas political subdivisions will undoubtedly soon follow in the taxation of goods in transit. Nor is that result restricted to Texas; other states and their subdivisions, too, could institute such tax practices both with respect to property taxation and, perhaps, as to other forms of taxation. The consequent burdens, financial and administrative, have the real potential to be devastating to the national economy.

The Texas Supreme Court noted that *Michelin* "overruled earlier cases to adopt a new analytical framework, thereby creating 'a fundamentally different approach to cases claiming the protection of the Import-Export Clause.' " (App. 4a). While that observation is undoubtedly true, this Court has never indicated that *Michelin* obliterated the entirety of the Import-Export Clause jurisprudence that preceded it. Indeed, in *Michelin*, the Court overruled only one case, and the Court has never overruled the cases which held that goods in transit are not

taxable. Rather than overrule this prohibition, *Michelin* recognized it and its continued application in proper cases. Moreover, this prohibition of taxation of goods in transit vindicates the policies underlying the Import-Export Clause, recognized in *Michelin*. Further, this prohibition provides needed guidance to local governments in applying their taxing authority. The far-reaching effect of the Texas Court's decision should be circumscribed and the long-standing bright-line rule – that the states may not tax property in transit – should be applied to bring stability and certainty to this area of the law which sorely needs those qualities. These reasons warrant the continued application of this principle as an integral part of the new analytical framework of *Michelin*.

Diamond Shamrock's oil was indisputably in transit at the time it was taxed, but Respondents nevertheless imposed the tax. The Texas Supreme Court erroneously upheld the tax by disregarding this essential prohibition.

I. THE HISTORICAL IN-TRANSIT RULE IS STILL APPLICABLE.

It has long been the law, under both the Import-Export and Commerce Clauses, that "the States may not tax property in transit." *E.g., Minnesota v. Blasius*, 290 U.S. 1, 9 (1933); *see, e.g., Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65-66 (1974); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 80, 83 (1946); *Carson Pet. Co. v. Vail*, 279 U.S. 95, 101 (1929); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469, 476 (1926); *Champlain Realty Co. v. Town of Brattleboro*, 260 U.S. 366, 376 (1922); *General Oil*

Co. v. Crain, 209 U.S. 211, 229 (1908); *Coe v. Town of Errol*, 116 U.S. 517 (1886).

This Court in *Michelin* did not overrule any of these and other cases which held that goods actually in transit were not taxable. Indeed, none of these prior cases have been overruled. In *Michelin*, the Court overruled only one case, and overruled it only insofar as it was contrary to the Court's holding that "Georgia's assessment of a nondiscriminatory ad valorem property tax against the imported tires [which were no longer in transit] is not within the constitutional prohibition against laying 'any Imposts or Duties on Imports. . . . ' " *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 279, 301 (1976), *overruling*, *Low v. Austin*, 13 Wall. 29 (1872). The Court predicated its discussion of the Import-Export Clause analysis of *Michelin* on the distinction between goods in transit and those that were not. *Michelin*, 423 U.S. at 286.

No case since *Michelin* has challenged in this Court a tax actually on goods in transit. Nevertheless, the Court has on several occasions discussed the in-transit status of goods and has applied the principles of pre-*Michelin* cases in resolving the contentions raised. *See, e.g., Itel Containers Int'l Corp. v. Huddleston*, ___ U.S. ___, 113 S. Ct. 1095, 1106 (1993) (sales tax on proceeds of container leases, not on goods in transit, held valid); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 154-55 (1986) ("nothing transitory about" tobacco that had reached its destination and was stored in warehouse; storage in custom-bonded warehouse did not confer "in-transit" status); *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 757 (1978); *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 436 (1979) (tax on

cargo containers – instrumentalities of commerce – not goods in transit); *Michelin*, 423 U.S. at 302 ("tires in this case were no longer in transit"). In *R.J. Reynolds*, as in *Michelin*, the Court considered in-transit contentions concerning ad valorem taxation. In both cases, the goods were not in transit and, in upholding the taxes, the Court went to considerable lengths to distinguish the facts on that basis. *R.J. Reynolds*, 479 U.S. at 154-55; *Michelin*, 423 U.S. at 302.

Because this Court has not considered a tax on goods actually in transit after *Michelin*, it has not fully discussed the effect of the in-transit status. In *Washington Stevedoring*, however, the Court cited commentaries which discussed the in-transit qualification of *Michelin*. *Washington Stevedoring*, 435 U.S. at 755 n.20. These commentaries expound the continued immunity for goods in transit which the Court described in *Michelin*. *See* W. Hellerstein, *Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports*, 1976 S. Ct. Rev. 99, 116 (1976); Comment, *Constitutional Law - Nondiscriminatory Ad Valorem Property Tax May Be Applied to Imports*, 30 Rutgers L. Rev. 193, 202 (1976); Note, 12 Wake Forest L. Rev. 1055, 1062 (1976).

"*Michelin* teaches that nondiscriminatory ad valorem property taxes are not 'impost' or 'duties' within the meaning of the Import-Export Clause, at least when the goods sought to be taxed are not in transit." *Hellerstein*, 1976 S. Ct. Rev. at 117.

> Whether the court is saying that an exaction not otherwise an "impost" or "duty" becomes one when imposed upon goods in transit or, alternatively, that there is a "protected penumbra" of guarantees beyond the explicit terms of the

> clause that would bar such an exaction, a court must consider this issue [the in-transit issue] in examining a taxpayer's claim that a state tax is a prohibited tax on imports, if it has concluded that the levy does not discriminate against such goods. [Footnotes omitted].

Id. at 116. The standards developed under the Commerce Clause provide appropriate criteria and should be used in determining the in-transit status under the Import-Export Clause. *Id.* at 126.

Another of these commentators agreed with Professor Hellerstein's analysis noting that *Michelin* replaced the original package doctrine with a two-level analysis. Comment, 30 Rutgers L. Rev. at 202. Under that analysis, "[o]nly if the tax is nondiscriminatory *and* leveled on goods not 'in transit' will the tax be valid under *Michelin.*" (Emphasis added) *Id.* The third commentary cited in *Washington Stevedoring*, in the one paragraph devoted to the issue, noted that goods in import transit were an exception to the unequivocal holding of *Michelin* so that even a nondiscriminatory tax on such goods would violate the Import-Export Clause. Note, 12 Wake Forest L. Rev. 1055, 1062 (1976).

In sum, even after *Michelin*, just as the pre-*Michelin* cases held, property taxes on goods in transit are repugnant to the Import-Export Clause. J. Hellerstein, *State Taxation*, ¶ 5.4 at 188 (1983). *Michelin* limited the prohibition of taxes under the Import-Export Clause to the same bounds applicable under the Commerce Clause; both prohibit discriminatory taxes and taxes on goods in transit. Hellerstein, 1976 Sup. Ct. Rev. at 130; *see State Taxation*, ¶ 4.11 at 137. In other words, *Michelin* limited Import-

Export Clause immunity by vitiating the original package doctrine and made that immunity coextensive with that afforded domestic goods in interstate transit. *See* Hellerstein, 1976 Sup. Ct. Rev. at 124. The standards for determining the in-transit issue under the Commerce Clause likewise apply to that issue under the Import-Export Clause. *Id.* at 126.

II. THE HISTORICAL IN-TRANSIT RULE IS SUPPORTED BY THE IMPORT-EXPORT CLAUSE PURPOSES DISCUSSED IN *MICHELIN*.

The Texas Supreme Court incorrectly viewed and applied this Court's *Michelin* analysis and thereby erroneously denied the in-transit status of Diamond Shamrock's oil any efficacy. In that Court's view, the *Michelin* test monolithically applied to all nondiscriminatory property taxes to deny Import-Export Clause protection even to goods admittedly in transit. (App. 5a-6a). That view denies any effect to the several mentions of the in-transit status in *Michelin* and later cases. Contrary to this Texas Court's view, the distinctive status of goods in transit was purposefully referenced in *Michelin*. The in-transit status certainly has significance to both the first and third Import-Export Clause concerns. Even a nondiscriminatory ad valorem property tax on goods in transit impermissibly impacts the Federal Government's ability to speak with one voice in matters of foreign relations and disturbs the harmony among the states.

A. *Speak With One Voice.* In *Michelin*, in summarizing its analysis of the historical underpinnings of the Import-Export Clause, the Court noted that nothing in

that history "even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution." *Michelin*, 423 U.S. at 286. Then, in discussing the first element of the analysis announced, this Court noted:

> It is obvious that *such* nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition. By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation. [Emphasis added]

Id. This discussion of the "speak with one voice" element which concerned "*such* nondiscriminatory property taxation," referred back to, and made the discussion referable to, such nondiscriminatory property taxation "imposed on goods that are no longer in import transit." *Id.*

A nondiscriminatory property tax on goods no longer in import transit has no impact on the Federal Government's exclusive regulation of foreign commerce, does not fall on imports as such because of their place of origin, etc. *Id.* at 286. To the contrary, such a tax on imported goods in transit does impact the Federal Government's regulation of foreign commerce. *Louisiana Land & Exploration Co. v. Pilot Pet. Corp.*, 900 F.2d 816, 821 (5th

Cir. 1990), *cert. denied*, 498 U.S. 897 (1990); *see Itel*, 113 S. Ct. at 1106; *Michelin*, 423 U.S. at 286. In *Louisiana Land*, the State of Alabama imposed an excise tax on jet fuel delivered aboard a foreign vessel bound for Canada. *Louisiana Land*, 900 F.2d at 821. The court applied the *Michelin* analysis and, noting that oil is shipped from foreign sources primarily in oceangoing tankers, held that the tax discouraged foreign parties who purchased oil from United States companies from using United States ports to transport the fuel from the United States to foreign countries. *Id.* Further, the court noted, coastal states with ports like the Port of Mobile, Alabama derived significant revenue from such a tax because they could tax large quantities of fuel that were delivered into tankers from the port. *Id.* at 821. The court further noted that the tax was not on stored inventory or a business or occupation, but, rather, the tax was levied on the goods themselves while they were in transit, and thus further relied upon *Richfield Oil*, which, the court noted, has never been overruled. *Louisiana Land*, 900 F.2d at 819, 821. The court recognized that permitting any and every state to impose a direct tax on goods in transit in the export stream would circumvent the speak with one voice element of *Michelin*. *Id.* at 821. The court held that the fuel tax was an impost upon an export within the meaning of the Import-Export Clause and, thus, held the tax unconstitutional. *Id.*

The reasoning of *Louisiana Land* applies with greater force to this case. The taxes imposed in Nueces County, Texas on Diamond Shamrock's oil were, undeniably, imposed upon the oil itself while it was in transit. (App. 57a-58a). Unlike the tax in *Louisiana Land*, which fell upon a discrete transaction or occurrence in Alabama, the sale

or handling for use of the fuel, the tax on Diamond Shamrock's oil was imposed merely upon the presence of the oil. *Id.* at 822 (Jolly J., dissenting); *see Itel*, 113 S. Ct. at 1106; *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 9 (1986) (tax imposed only on sale, a discrete transaction). Hence, in addition to the effects noted in *Louisiana Land*, the tax on Diamond Shamrock's oil gives rise to a substantial risk of multiple taxation. Unlike taxing a discrete event or occurrence, because the oil can and will be "present" in many foreign jurisdictions, it is as much subject to taxation in those jurisdictions as it is in Nueces County. By contrast with goods in transit, when goods have reached their final destination and are no longer in transit, a business purpose of the owner is being served, the goods become a part of the mass of property within that jurisdiction and taxation is proper. *See Michelin*, 423 U.S. at 302; *License Cases*, 5 How. 504, 575-76 (1847) (Taney, C.J.).

Further, by definition, a property tax on goods in transit, even one that, on its face, appears to be non-discriminatory, falls upon the goods as such because of their place of origin. *See Michelin*, 423 U.S. at 286. Goods merely passing through a taxing jurisdiction en route to their intended destination and present in that jurisdiction for no other purpose of the owner are there, and hence taxed there, because their place of origin required them to be transported through the jurisdiction. That is certainly true of Diamond Shamrock's oil in this case. Foreign shipment of oil is accomplished almost exclusively by oil tanker, that being the only practical means for such transportation. *See Louisiana Land*, 900 F.2d at 821; (Pet. at 7, 7 n.6). If Diamond Shamrock's oil had not come by tanker

from foreign sources, it would never have been in Nueces County, en route to its final destination. Nor would it have been subject to the brief stoppage caused solely by the change of the means of transportation from oceangoing tanker to pipeline. Perforce, its foreign origins necessarily resulted in the imposition of the tax on the oil concerned in this cause. Moreover, the Texas tax is inherently applied selectively to this oil which was unfortuitously in Nueces County on January 1 while in transit to the Three Rivers refinery. *See Michelin*, 423 U.S. at 286. Despite being present in Nueces County for only weeks or even days, this oil was nonetheless taxed at the full rate, on the full value of the oil, just as personal property permanently located in the state. (App. 57a-58a). A state or its subdivision cannot serve its parochial interest and burden foreign commerce by such a tax. *See Associated Indus. v. Lohman*, ___ U.S. ___, 114 S. Ct. 1815, 1822 (1994) (burden on commerce of discriminatory tax "is appropriately assessed with reference to the specific subdivision [of the state] in which applicable laws reveal differential treatment,"); *Fort Gratoit Sanitary Landfill, Inc. v. Michigan Dept. of Nat. Resources*, ___ U.S. ___, 112 S. Ct. 2019, 2024 (1992) (State or its subdivision may not avoid strictures of Commerce Clause by curtailing the flow of commerce through State or subdivision).

B. *Harmony Among The States.* The Texas tax disturbs the harmony among the states and, hence, does not meet the third concern discussed in *Michelin*. This Court noted in *Michelin* that "nondiscriminatory ad valorem property taxes do not interfere with the free flow of imported goods among the states, as did exactions by States under the Articles of Confederation *directed solely at imported*

goods." Michelin, 423 U.S. at 288. The ad valorem tax here as it is applied to Diamond Shamrock's oil is directed solely at those imported goods. This Texas ad valorem property tax is normally applied only to property that is located in the taxing jurisdiction with some permanence. *See* Tex. Tax Code Ann. § 11.01(b), (c) (Vernon 1992). Contrary to the circumstances of other personal property, Diamond Shamrock's in-transit oil is only temporarily in the Nueces County taxing jurisdictions; indeed, it is only passing through. Hence, the tax as applied here is an exaction upon imports *as imports*, not a "property tax indiscriminately applied to all owners of property." *Michelin*, 423 U.S. at 300, *citing*, *License Cases*, 5 How. at 576. In *Michelin*, this Court recognized that ad valorem property taxes are not proper under the Import-Export Clause on goods "merely *in transitu*, and on their way to the distant cities, villages, and country for which they are destined" and those goods could "in no sense be regarded as a part of that mass of property in the State usually taxed for the support of the state government." *License Cases*, 5 How. at 575; *see Michelin*, 423 U.S. 290, 290 n.10, *citing*, *License Cases*, 5 How. at 575-76. Taxes on such goods are "no more than transit fees on the privilege of moving through a state," and are precisely the type of nondiscriminatory property taxes that can be prohibited to secure the third noted purpose of the Import-Export Clause. *Michelin*, 423 U.S. at 290.

Again, with respect to this third concern, the Texas Supreme Court has interpreted *Michelin* too narrowly. (App. 6a). That court concluded that there simply was no opportunity for a disturbance of the harmony among the states because the goods were in transit within the only

state the goods ever entered. (*Id.*) This Court has consistently recognized the fallacy of this conclusion. Actions of state subdivisions are equally subject to constitutional strictures as are those of the States. *Associated Industries*, 114 S. Ct. at 1822; *see Fort Gratoit*, 112 S. Ct. at 2024. More importantly, goods in transit are not "part of that mass of property in the state usually taxed for the support of the state government." *License Cases*, 5 How. at 575.

Finally, that the tax herein is precluded under the third *Michelin* element is further evidenced by the fact that importers of goods, particularly importers of foreign crude, under the extant circumstances are deprived of the modern transportation options explicitly recognized by this Court in *Michelin* as a means to avoid taxation. *See Michelin*, 423 U.S. at 288. Those means of transportation "enable importation directly into the inland States." *Id.* As the Texas Court recognized, domestic oil can be transported by trucks or pipelines in smaller amounts on intermittent trips and, thus, avoid taxation. (App. 12a). The fact that the oil here was, as stipulated, necessarily stopped at the port of entry merely to accommodate and facilitate its transit made it no less "directly" imported than the cited means of transportation allow importation. *See id.* That pause in transit should not, and indeed does not, make the goods taxable. To uphold the tax would permit taxation of and interference with the importation of the oil despite the use of the very means of avoiding taxation specified in *Michelin*. But the Court in *Michelin* did not describe a mere tax avoidance device; this Court's observation recognized the constitutional bar of taxation of goods in transit. This constitutional infirmity can, and must, be avoided "merely by prohibiting the assessment

of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed." *Id.* at 290.

Both the first and third elements of *Michelin* are not met where the goods to be taxed are in transit. *Michelin*, 423 U.S. at 286. The distinction recognized, though not applied, in *Michelin* and other cases concerning goods in transit must be given effect in the proper case. In this case, the oil is indisputably in transit and the in-transit distinction must be given effect. *Michelin* prohibits the instant tax. *See id.*

III. APPLICATION OF THE BRIGHT-LINE IN-TRANSIT RULE IS NEEDED.

In *Michelin*, the court turned from formalistic determinations that embodied the concept that all state taxation that fell on imports was prohibited by the Import-Export Clause. *See, e.g., Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 360 (1984); *Washington Stevedoring*, 435 U.S. at 762 (Powell, J., concurring). The Court has also turned from rules that have no relationship to economic realities. *E.g., Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977). But, nevertheless, the Court has not rejected all prior authorities and approaches for determining immunity from taxation. *See, e.g., Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S. Ct. 1904, 1912, 1914 (1992) (pre-*Complete Auto* bright-line rule applied); *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 189-90 (1983) (*Japan Line* established bright-line rule); *Michelin*, 423 U.S. at 300-301 (overruling *Low v. Austin*, but relying on *License Cases*). Bright-line rules like the prohibition of taxation of goods

in transit have a place in the jurisprudence of commerce. *See Quill*, 112 S. Ct. at 1908-09, 1914. In *Quill*, the North Dakota Supreme Court shunned a "bright-line rule" of a pre-*Complete Auto* case for a more "flexible substantive approach," concluding that subsequent developments in the law required rejection of the earlier principles. *Id.* In reversing the North Dakota Court's judgment, this Court noted: "We have never intimated a desire to reject all established 'bright-line' tests." *Id.* at 1914.

> "Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation."

Id.

Quill demonstrates that all bright-line tests have not been supplanted by flexible substantive approaches. *Id.* Some formal demarcation of a discrete realm of commerce that must be free from state taxation is both permissible and warranted. This is certainly true where the formalism is not merely a trap for unwary draftsmen. *Id.* The long-standing, bright-line demarcation asserted herein, which has never been overruled or seriously questioned, meets the *Quill* criteria and should be applied. *See id.*

The prohibition of taxation of goods in transit is warranted by the policies underpinning the Import-Export Clause and properly addresses those policies. The establishment of definite boundaries of legitimate state taxing authority is desirable and beneficial in this area of the law which has been described as a "quagmire," *id.* at

1915, and, in some respects, as being "completely indeterminate," *Itel*, 113 S. Ct. at 1107 (Scalia, J., concurring); *see id.* at 1107-08 (illustrating indeterminate nature of test by discussion of "speak with one voice" test that, applied literally, would always be satisfied), and in which there is "much room for controversy and confusion" and little precise guidance to the states. *Quill*, 112 S. Ct. at 1915. These observations are undoubtedly true and, in fact, are illustrated by this case. (App. 1a-7a). The in-transit rule should be specifically reaffirmed and applied in this case to resolve the confusion and to provide workable guidelines. The preference for such a rule is particularly warranted because less than two years before *Michelin* the Court recognized the virtue of the simplicity of such rules which meet the "highly important" need of both the shipper and the State for clear definition "to avoid all ambiguity or questions." *Kosydar*, 417 U.S. at 71.

CONCLUSION

For the foregoing reasons, and the reasons advanced by the Petitioner, which IPT wholeheartedly endorses, Amicus Curiae, the Institute of Property Taxation urges that Diamond Shamrock's petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

THE INSTITUTE OF PROPERTY TAXATION – STATEMENT OF PRINCIPLES, PURPOSES AND CODE OF ETHICS

The Institute of Property Taxation is a non-profit nationwide organization which exists to promote ethical and professional standards of conduct among its members and to administer formal educational programs related to state and local ad valorem, sales and use taxes.

The Institute has a written code of ethics and standards of professional practice, whereby each member agrees to be governed by objective and professional standards consistent with sound administration of property and state and local tax laws and the adoption of tax legislation, with due regard for the interests of society as well as those of the member company. The following are the Institute's Statements of Principles and Purposes and the Code of Ethics.

PRINCIPLES

The Institute of Property Taxation is dedicated to fostering the professionalization of its members, to promoting the uniform and equitable administration of ad valorem taxation and all other forms of state and local taxation (other than income taxation) and to minimizing the costs of administration and compliance.

PURPOSES

In furtherance of the above principles, the Institute of Property Taxation is formed for the following purposes:

1. To foster the education and professionalization of its members and to provide its membership with the information and services necessary to effectively carry out their responsibilities in ad valorem and all other forms of state and local taxation (other than income taxation).

2. To preserve and promote the use of equitable and non-discriminatory methods in taxation of business enterprises carrying on diversified activities in taxing jurisdictions.

3. To eliminate inequitable and discriminatory distortion or otherwise illegitimate methods of determining tax liabilities.

4. To collect, analyze and disseminate information with respect to existing and proposed legislation, regulations and administrative action which is pertinent to the purposes of the Institute; encourage the free discussion of such subjects; present the views of the Institute to other taxpayer organizations, governmental bodies and other interested persons; and take such other actions as are deemed appropriate to the accomplishment of its purposes.

5. To develop and operate a program for the education of its members and to promote the study of property taxation and other forms of state and local taxation (other than income taxation) by encouraging research and by conducting conferences and symposiums on tax matters.

These principles and purposes of the Institute of Property Taxation can be achieved only by the observance of the highest standards of ethical and professional conduct by its members. To insure the observance of these

high standards, the Board of Governors has adopted the following code of ethics.

CODE OF ETHICS
STANDARDS OF PROFESSIONAL CONDUCT

The Institute of Property Taxation has established this Code of Ethics and Standards of Professional Conduct to set forth ethical and professional guidelines for all IPT members in the administration of property and sales and use taxes.

Each member of IPT agrees to subscribe to this Code of Ethics and Standards of Professional Conduct and to report to the IPT Committee on Professional Ethics any unethical practices or actions by any IPT member.

1. IT IS UNETHICAL to engage in any conduct that discredits IPT, or the tax profession.

2. IT IS UNETHICAL to engage in any activity that results in a conviction of any crime that involves the tax profession.

3. IT IS UNETHICAL to operate beyond the boundaries of an agreed relationship with an employer or a client.

4. IT IS UNETHICAL to infer or imply that you represent a person or firm you do not represent, or to file any document on behalf of a taxpayer without specific authorization of the taxpayer.

5. IT IS UNETHICAL to violate the confidential nature of the employee-employer or the consultant-client relationship, except as required by law.

6. IT IS UNETHICAL to offer or accept anything of value with the intent of inducing a specific action.

7. IT IS UNETHICAL to offer or accept anything of value as a share of a fee for an assignment in which you did not participate.

8. IT IS UNETHICAL to assign, accept or perform a tax assignment that is contingent upon producing a predetermined analysis or conclusion.

9. IT IS UNETHICAL to file or proceed with any appeal in which there is known to be no basis in fact. The determination of whether a basis in fact exists must be made as soon as reasonably possible.

10. IT IS UNETHICAL in the performance of a tax assignment to issue an appraisal, analysis or opinion that fails to disclose bias or the accommodation of a personal interest.

11. IT IS UNETHICAL in the performance of a tax assignment to willfully furnish inaccurate, deceitful, or misleading information, or to willfully conceal material information.

12. IT IS UNETHICAL to prepare or use in any manner a resume or statement of professional qualifications that is misleading or false.

13. IT IS UNETHICAL in promoting a tax practice and soliciting assignments to utilize misleading or false advertising.

14. IT IS UNETHICAL in promoting a tax practice and soliciting assignments to make a direct reference to superiority over an individual competitor.

15. IT IS UNETHICAL to solicit any tax assignment by assuring a specific result or by stating a conclusion regarding that assignment without prior analysis of the facts and circumstances pertaining thereto.

16. IT IS UNETHICAL to use client listings or references without specific authorization.

17. IT IS UNETHICAL to make any solicitation implying IPT authorization, endorsement or approval of any product or service.

18. IT IS UNETHICAL in the performance of an independent fee appraisal to violate any part of the "Uniform Standards of Professional Appraisal Practice" issued by The Appraisal Foundation.

Adopted by Board of Governors, April 28, 1991.